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81-40

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES
(October Term 1981)

CYNTHIA PROCTOR,

Petitioner,

vs.

PAUL KRAMER, M.D.,

Respondent.

- - - - - - - - - - - - -

WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

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PETITION FOR CERTIORARI

A. QUESTIONS PRESENTED FOR REVIEW.

On January 24, 1975, the petitioner suffered serious bodily injury from the alleged medical malpractice of the respondent. The statute of limitation for bringing such an action was two (2) years. Section 95.11(4)(b), Florida Statutes (1975). At the time the action accrued Florida had a special, statutory procedure for screening medical malpractice claims. Section 768.40 et seq., Florida Statutes (1975). It is interesting to note that during the pendency of this action the Florida Supreme Court, in Aldana v. Holub, 381 So. 2d 231 (Fla. 1980), ruled that statute unconstitutional as a violation of a claimant's due process rights. Under this statutory procedure, when an applicable action was commenced, the mediation panel took jurisdiction of the claim. While the action was in the jurisdiction of the mediation panel the two (2) year statute of limitation period was tolled for 120 days, unless extended by order of the

judicial referee. Upon an order, jurisdiction could be extended to six (6) months, but in no event could it be extended past ten (10) months. Section 768.44(3), (4), Florida Statutes (1975).

The petitioner filed her claim with the mediation panel on June 24, 1976, thereby tolling the statute of limitation with seven (7) months remaining. No "mediation" hearing on the petitioner's claim was held within the 120 day period; however, the respondent filed a timely request to extend the jurisdiction of the panel on August 10, 1976, within the 120 day period. An Agreed Order extending the panel's jurisdiction was entered on November 16, 1976. This, order was entered after the 120 day period had expired. (A. 1).

The Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida ruled that because the Agreed Order was not entered until after the 120-day period, jurisdiction of the mediation panel was not extended and therefore terminated on October 24, 1976, thus causing the statute of limitation to start running again on that date. Accordingly,

the court ruled the limitation period ended on May 24, 1977, and granted a summary final judgment for the respondent since the petitioner's claim was not filed in the circuit court until June 21, 1977. (A. 3).

Had the court ruled the Agreed Order, which was never questioned by the parties in the mediation proceedings, was valid, the mediation jurisdiction and tolling of the statute of limitation would have continued for at least six (6) months, until December 24, 1976, causing the statute of limitation period to expire on July 24, 1977. Thus, the petitioner's claim would have been timely filed and the suit would not have been dismissed.

The most pertinent facts giving rise to this petition involve Florida's appeal procedure. In the case sub judice this procedure effectively denied the petitioner her due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution.

When the summary final judgment was entered, the petitioner appealed to the Fourth

District Court of Appeal of Florida. That court, in a per curiam decision with one dissent, affirmed the circuit court. Proctor v. Kramer, 394 So. 2d 121 (Fla. 4th D.C.A. 1980) (rehearing denied March 3, 1981). This holding, as indicated by the dissent, was in direct conflict with the decision of Limond vs. Llanio, 349 So. 2d 214 (Fla. 3d DCA, 1977). Had Limond been followed, the court would have reversed the summary final judgment. When the case was in the appellate process this party could have expected supreme court review in the event the Fourth District Court of Appeal of Florida ruled contrary to Limond.

After petitioner's motion for a rehearing was denied on March 3, 1981, she filed an appeal to the Florida Supreme Court. A recently enacted provision of the Florida Constitution, Article V, Section 3(b)(3), provided a basis for invoking that court's jurisdiction. The provision states the Florida Supreme Court may review a decision of a district court of appeal "that expressly and directly conflicts . . . with a decision of

another district court of appeal or of the supreme court on the same question of law." Florida Constitution, Article V, Section 3(b)(3). Prior to the effective date of this provision, (April 1, 1980), the Florida Constitution allowed the Florida Supreme Court to review by certiorari conflicting decisions between or among the several state district courts of appeal, irrespective of whether the conflict was apparent in the face of the district court decision, or whether it was necessary to review the trial court proceedings to establish the conflict. The purpose was not to have inconsistent laws effective within different districts of the same state.

Prior to the appeal to the Florida Supreme Court in the case sub judice, the supreme court in Jenkins v. State, 387 So. 2d 1356 (Fla. 1980), interpreted the terms "expressly and directly" to require a written majority opinion expressing the conflict. The fact that a conflict between the districts was "express" in a dissenting or concurring opinion was deemed not to establish a conflict. Since the

conflict in the instant case was "express" only in the dissenting opinion, the Florida Supreme Court summarily held it was without jurisdiction to resolve the conflict.

Such a refusal to resolve conflicts between the districts is arbitrary and capricious and, therefore, a denial of the petitioner's due process and equal protection rights.

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D. OPINIONS DELIVERED IN COURTS BELOW

Proctor v. Kramer,
394 So. 2d 121 (Fla. 4th DCA 1980)
(rehearing denied March 3, 1981)

Proctor v. Kramer,
Case No. 60,450, filed April 8, 1981
(Fla. 1981).

E. JURISDICTIONAL GROUNDS. The judgment sought to be reviewed is the Florida Supreme Court's dismissal of the petitioner's appeal on April 8, 1981. This Court has jurisdiction under 28 U.S.C. 1257(3). The petitioner has been denied her due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution.

F. CONSTITUTIONAL PROVISIONS AND STATUTES.

§3. Supreme court

(b) Jurisdiction.--The supreme court:

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

(4) WITHIN TWO YEARS. --

(b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is

discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued.

768.44 Medical liability mediation panels; membership; hearings.

(3) The clerk shall, with the advice and cooperation of the parties and their counsel, fix a date, time, and place for a hearing on the claim before the hearing panel. The hearing shall be held within 120 days of the date the claim was filed with the clerk unless, for good cause shown upon order of the judicial referee, such time is extended. Such extension shall not exceed 6 months from the date the claim is filed. If no hearing on the merits is held within 10 months of the date the claim is filed, the jurisdiction of the mediation panel on the subject matter shall terminate, and the parties may proceed in accordance with law.

(4) The filing of the claim shall toll any applicable statute of limitations, and such statute of limitations shall remain tolled until the hearing panel issues its written decision or the jurisdiction of the panel is otherwise terminated. In any event, a party shall have 60 days from the date the decision of the hearing panel is mailed to the parties or the date on which the jurisdiction of the panel is otherwise terminated in which to file a complaint in circuit court.

G. STATEMENT OF CASE. The petitioner's action for medical malpractice accrued on January 24, 1975. Pursuant to Section 768.40 et seq., Florida Statutes (1975), the petitioner filed her mediation claim on June 24, 1976. On November 15, 1976 an Agreed Order extending jurisdiction of the panel was entered by the Circuit Court of the Seventeenth Judicial Circuit of Florida. (A. 1). No mediation hearing was held.

On June 21, 1977 the petitioner filed her action in circuit court. The court, on May 16, 1979 entered a summary, final judgment against the petitioner dismissing her claim holding that it was not timely filed. (A. 3).

The Summary Final Judgment was affirmed per curiam on May 7, 1980 by the Fourth District Court of Appeal of Florida, with a dissenting opinion. (A. 7). Petitioner moved for a rehearing on May 21, 1980. This motion was denied on March 3, 1981.

The petitioner then appealed to the Florida Supreme Court. On April 8, 1981 the supreme court dismissed petitioner's petition

for review, holding the court was without jurisdiction to decide the cause.

The federal questions concerning the petitioner's due process and equal protection rights were first raised in the petitioner's brief on jurisdiction to the Florida Supreme Court. The arguments, however, were disposed of summarily. This instance is the first opportunity petitioner has had to fully raise these constitutional questions.

H. ARGUMENT.

The Florida Constitution, Article V, Section 3(b)(3) as interpreted by Jenkins v. State, 349 So. 2d 215 (Fla. 1980), violates the petitioner's equal protection and due process rights.

A general rule of constitutional law is that appellate review is not required under due process on the condition a full, fair trial on the merits is provided. Lindsey v. Normet, 405 U.S. 56, 77, 31 L. Ed. 2d 52, 92 S. Ct. 862 (1972); Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585. See, Ohio ex Rel. Bryant, 281 U.S. 74, 74 L. Ed. 710, 50 S. Ct. 228 (1930). The petitioner never received a full, fair trial on the merits. She was first denied the right to a trial by having to submit her claim to the mediation panel. The statute requiring this was ruled unconstitutional as a denial of a claimant's due process rights. See Aldana v. Holub, 381 So. 2d 231 (Fla. 1980). If the petitioner had not been required to go through mediation, as is now the case, she would have timely filed her complaint as she

would have filed it directly in the circuit court rather than with the mediation panel.

When the action was in mediation the respondent timely filed a motion to extend the panel's jurisdiction. However, no hearing on respondent's motion for extension was held within the 120 day period; instead, an "Agreed Order" was entered after that time. At the time this occurred, neither the mediation statute nor any judicial opinions determined that the 120 day period was a jurisdictional deadline. The petitioner filed her common-law action in circuit court on June 21, 1977 which would have been timely if, as she believed, jurisdiction of the mediation panel had been extended. However, as held by the trial court and affirmed by the Fourth District Court of Appeal of Florida, mediation jurisdiction ended after 120 days. Thereby, petitioner, through no fault, was deprived access to a trial.

Assuming the petitioner was not deprived of a full, fair trial on the merits, this Court has held that when an appeal is afforded it cannot be granted to some litigants

and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. Lindsey v. Normet, 405 U.S. 56, 77 (1972). In Lindsey a tenant was required to post a double bond as a requisite to appeal. The Court held this requirement did not relate to the damage allegedly suffered by the landlord, thereby holding the requirement was arbitrary and a denial of the tenant's equal protection rights.

In the case sub judice the requirement of a written majority opinion before a case is granted the full scope of the state's appellate review is likewise arbitrary. The effect of the interpretation of the Florida Constitution is to allow some claimants the opportunity of requesting the Florida Supreme Court to resolve a conflict to their benefit while others would not, merely because a district court of appeal does or does not write a majority opinion. Such a procedure constitutes an arbitrary denial of the final level of the State appeal procedure, and allows a district court of appeal to establish, by

silence, a separate body of law within that district, not subject to review by the highest court in the state. In effect, it allows an intermediate level appellate court to determine the Florida Supreme Court's jurisdiction.

The arbitrary manner of granting or denying access to Florida's last level of appellate review is evidenced by the method of disposing of those appeals where no majority opinion is written. The Court summarily denies jurisdiction without considering the briefs on jurisdiction which would, arguably, set out the requisite conflict in a short, concise manner.

The reason delineated for this arbitrary and summary disposal of appeals from per curiam decisions is that the Florida Supreme Court would become overburdened if all such appeals required consideration. See, Jenkins v. State, supra; England, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L. Rev. 147, 176 (1980). While the burden upon the Court may be greater by allowing the appeal of per curiam decisions, the potential harm to claimants resulting from

the denial of that right to appeal a district court's decision, especially where other claimants have such a right in cases differing only in that a written majority opinion is authored, outweighs any advantage of reducing the supreme court's caseload. Can the Florida Supreme Court be more overburdened than this Court?

There is little doubt the guarantee of equal protection in the Fourteenth Amendment intended that all persons should have like access to the courts of the country. Barbier v. Connolly, 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357 (1885). This statement can not mean that equal protection is given only in respect to access to courts of first instance, and not to courts of appeal. See, Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956). The interpretation of the Florida Constitution by Jenkins places the petitioner in a position of being denied a right to an appeal to which others, in similar cases, would have been entitled. It is a rule of constitutional law that a party otherwise entitled to an appeal who, by the construction of a statute

is prevented from doing so, where such right is given to all others in similar cases, is deprived of due process. See, 16A Am. Jur 2d, Constitutional Law §859. In other words, due process should condemn the arbitrary withholding of the right of appeal when it is permitted to others in similar situations.

Had the Fourth District Court of Appeal of Florida written a majority opinion pointing out the conflict, the petitioner would have been able to appeal the decision, thus allowing the Florida Supreme Court to resolve the conflict among the districts. The petitioner's right to appeal was, therefore, cut off at the District Court level rather than the Supreme Court level merely because the District Court issued a per curiam decision. An identical case, in which a written opinion was rendered, would have conferred certiorari jurisdiction; and, even without a written opinion, review would have been available under prior Florida Law.

This procedure violates the petitioner's equal protection and due process rights. Petitioner, therefore, requests that a Writ of

Certiorari issue to the Supreme Court of The State of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Certiorari has been furnished, by United States Mail, to K. SCOTT DWYER, ESQUIRE, of Preddy, Kutner & Hardy, P.A., 12th Floor, Concord Building, 16 West Flagler Street, Miami, Florida 33130; and JIM SMITH, ESQUIRE, Attorney General of Florida, The Capitol, Tallahassee, Florida 32301, this 6th day of July, 1981.

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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES
(October Term 1981)

CYNTHIA PROCTOR,

Petitioner,

vs.

PAUL KRAMER, M.D.,

Respondent.

- - - - - - - - - - - - -

APPENDIX

GARY L. WILKINS and LEO WOTITZKY
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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. MM 76/60 Reasbeck

CYNTHIA PROCTOR,

Claimant,

vs.

PAUL KRAMER, M.D.,

Respondent.

_____/

AGREED ORDER GRANTING EXTENSION OF TIME FOR FINAL HEARING

THIS CAUSE having come on to be heard on the defendant's request for extension of time for the holding of the final hearing in the above styled cause, and counsel for all parties being in agreement and the Court, being fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that the defendant's request, be and the same, is hereby GRANTED, and the final hearing in this matter shall be conducted within ten (10) months from the date of the filing of the lawsuit.

DONE AND ORDERED in Chambers in Broward

County, Ft. Lauderdale, Florida, this 15th day of November, 1976.

/s/ JAMES M. REASBECK
CIRCUIT COURT JUDGE

Copies furnished to:
Brumer, Moss, Cohen, et al
Stephens & Schwartz, P.A.

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR BROWARD
COUNTY, FLORIDA

CASE NO. 77-9907 (Bridge)

CYNTHIA PROCTOR	)	
Claimant,	)	
vs.	)	SUMMARY FINAL JUDGMENT
PAUL KRAMER, M.D.,	)	
Respondent.	)	
	)	

THIS CAUSE having come before the Court on the Defendant's Motion for Summary Judgment and upon argument of counsel, and the Court being otherwise fully advised in the premises the Court herewith makes the following findings of fact:

1. That the Plaintiff's claim for mediation was filed on June 24, 1976, as a result of an alleged cause of action which occurred on January 24, 1975.

2. That on August 10, 1976, the Defendants filed a request for extension of time requesting the Court to enter an order

extending the time of the holding of the final hearing to the maximum allowable by the medical malpractice reform act.

3. That on November 15, 1976, an agreed order was entered stating that the final hearing in the mediation shall be conducted within ten months from the date of the filing of the law suit.

4. That there was no hearing held on the issue of the Defendant's actionable negligence within a hundred and twenty days of the date the Plaintiff's claim for mediation was filed.

5. That there was no order entered extending the time for the holding of the final hearing within a hundred and twenty days of the date the Plaintiff's claim for mediation was filed.

6. That there was no hearing scheduled on Defendant's request for extension of time within one hundred and twenty days of the date the Plaintiff's claim for mediation was filed.

IT IS FURTHER the finding of this Court that because one hundred and twenty days lapsed from the date the Plaintiff's claim for medical

mediation was filed without a hearing having been held and without an order having been entered extending the time for conducting the hearing that the jurisdiction of the medical mediation panel terminated on October 24, 1976.

IT IS FURTHER the finding of this Court that the order entered on November 15, 1976, extending the time is invalid because the jurisdiction of the mediation panel had previously terminated, and because it was not entered within the one hundred and twenty day period. This order is further held to be invalid and because said order is invalid on its face in that it purports to extend the time for the final hearing to ten months from the date of the filing of the lawsuit, when in fact Florida Statute 768.44(3) specifically states that said extension shall not exceed six months from the date the claim is filed.

WHEREFORE the Court herewith enters a Summary Final Judgment in favor of the Defendant, PAUL KRAMER, M.D., and against the Plaintiff, CYNTHIA PROCTOR, and said Plaintiff shall take nothing by this claim against said

Defendant, and said Defendant shall go hence without stay.

The Court further reserves jurisdiction for the taxation of costs, if applicable.

DONE AND ORDERED in Chambers at Broward County, Ft. Lauderdale, Florida this 16th day of May, 1979.

/s/ BARBARA BRIDGE
CIRCUIT COURT JUDGE

Copies furnished to:

Stephen T. Brown, Esq.
Gary Wilkins, Esquire

Cynthia PROCTOR, Appellant,

v.

Paul KRAMER, M.D., Appellee.

No. 79-1324

District Court of Appeal of Florida,
Fourth District.

May 7, 1980.

Rehearing Denied March 3, 1981.

Appeal from Circuit Court, Broward County; Barbara Bridge, Judge.

Gary L. Wilkins of Wotitzky, Wotitzky, Johnson, Mandell & Batsel, Punta Gorda, for appellant.

K. Scott Dwyer and John A. Thompson, Jr. of Preddy, Kutner & Hardy, P.A., Miami, for appellee.

PER CURIAM.

Affirmed.

LETTS, C. J., and HERSEY, J., concur.

MOORE, J., dissents with opinion.

MOORE, Judge, dissenting:

I respectfully dissent. In my opinion, we should follow the reasoning in Limond v. Llanio, 349 So.2d 214 (Fla. 3rd DCA 1977) and hold that the termination of the medical mediation panel's jurisdiction did not occur, until the

expiration of six months following the filing of the claim. By so holding, the common law complaint was filed within the applicable statute of limitations and the summary, final judgment in favor of the defendant was erroneous.

SUPREME COURT OF FLORIDA

WEDNESDAY, APRIL 8, 1981

CYNTHIA PROCTOR,	*	
	*	
Petitioner,	*	CASE NO. 60,450
	*	
vs.	*	District Court of
	*	Appeal, 4th District
PAUL KRAMER, M.D.,	*	- No. 79-1324
	*	
Respondent.	*	
	*	

* * * * * * * * * * * * *

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

By: /s/ Tanya Carroll
Deputy Clerk

cc: TC
Hon. Clyde Heath, Clerk
Hon. Barbara Bridge, Judge
Hon. Robert E. Lockwood, Clerk

Gary L. Wilkins, Esquire
K. Scott Dwyer, Esquire